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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1143

RONALD PAUL NORRIS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

THEODORE L. SENDAK
Attorney General of Indiana

DONALD D. DOXSEE
Deputy Attorney General

WILLIAM F. THOMPSON
Deputy Attorney General
Attorneys for Respondent

219 State House
Indianapolis, Indiana
633-5512

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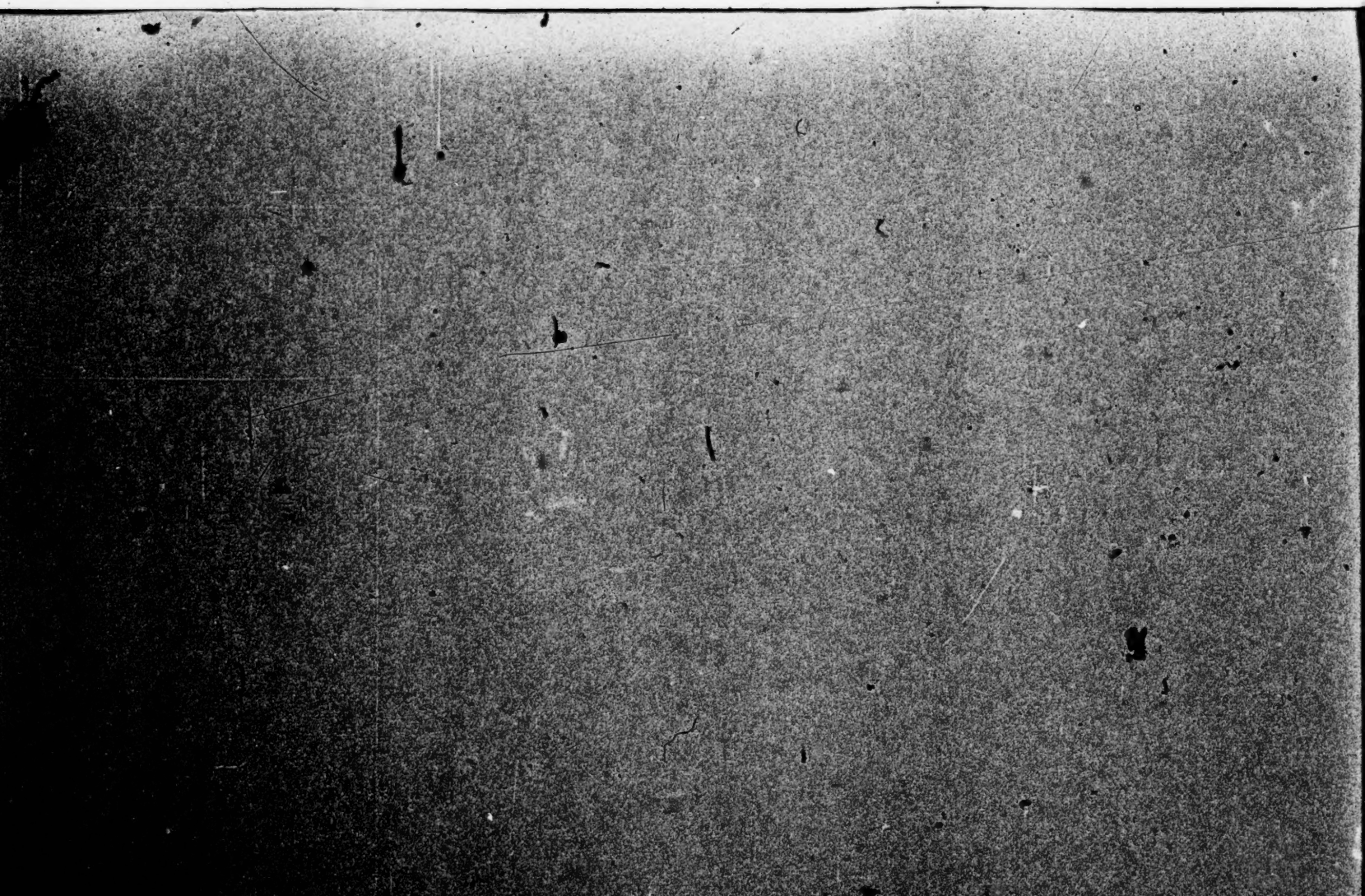

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. Whether the issues raised by Petitioner were decided by the Supreme Court of Indiana on independent and adequate non-federal grounds.

II. Whether the issues raised by Petitioner raise a substantial federal question.

III. Whether Petitioner was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

IV. Whether Petitioner was sufficiently identified at his trial as the person named in the affidavit charging him with Aggravated Assault and Battery.

RULES OF THE SUPREME COURT OF THE UNITED STATES INVOLVED

RULE 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned

such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general consideration outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of ceritorari.

STATEMENT OF CASE

Petitioner's "Statement of the Case" is inadequate. Consequently, Respondent sets out additional fact which Respondent feels revelant to this matter.

Regarding Petitioner's identification and presence at trial, the State produced four eyewitnesses to the aggravated assault and battery. All four of those witnesses, including the victim, testified that they knew or were acquainted with Petitioner prior to the acts for which he was being tried. (R. 205, 206, 209, 228, 256, 227). They all testified that the same defendant, Petitioner, who was being tried had committed the acts constituting aggravated assault and battery. (R. 197 200, 202, 203, 206, 232-234, 260, 261, 264, 279, 280). Petitioner was present in court on the day evidence was heard at his trial. (R. 118). During the trial, the victim, during cross-examination, indicated that he knew petitioner and that the petitioner was present. (R. 211).

Regarding Petitioner's right to a speedy trial, the assault and battery occurred August 6, 1965. (A. 12) The affidavit charging Petitioner with Aggravated Assault and Battery was filed August 26, 1965. (R. 2). On September 2, 1965, Petitioner moved to continue the trial. The motion was granted. (R. 20). On May 23, 1966, the day set for trial,

Petitioner failed to appear without cause. The trial was continued. (R. 23). On May 31, 1966, Petitioner filed an amended motion for a change of venue from the county. (R. 30). The motion was granted. (R. 32). On June 29, 1966, the change of venue to another county was perfected. (R. 88). On July 10, 1967, Petitioner's trial was begun. (R. 103, 104).

SUMMARY OF ARGUMENT

This is not a proper cause for direct review by certiorari. Petitioner presents two issues for this Court's consideration, that the Indiana Supreme Court unconstitutionally applied its Rule 1-4D, regarding Petitioner's right to a speedy trial under that Rule, and that Petitioner was not identified at his trial as the person named in the affidavit charging him with Aggravated Assault and Battery.

The issues raised by Petitioner were decided by the Supreme Court of Indiana on independent and adequate non-federal grounds. The issues raised by Petitioner present no substantial federal question.

Even if Petitioner has raised a question directly reviewable by certiorari, the record is clear that Petitioner was not denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and that Petitioner was adequately identified at his trial as the person named in the affidavit.

REASONS FOR DENYING THE WRIT — ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF

INDIANA IN THIS CASE WAS BASED ON INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS.

The issues Petitioner raises in this cause were decided by the Supreme Court of Indiana on independent and adequate state grounds. In a motion for discharge, the Indiana Supreme Court, under its Rule 1-4D, requires that the movant allege that the delay was not caused by him. In the instant cause the Court said:

> "There is insufficient evidence in the record from which we are able to draw a conclusion, with any degree of certainty, as to exactly what transpired after the appellant's change of venue was perfected to Sullivan County. The appellant made no allegation in his second motion to dismiss that he was free from contribution to the delay in any way. His motion, standing alone, is inadequate in this regard, without evidence, or a verified allegation alleging at whose insistence this cause was delayed, we cannot say as a matter of law that appellant is entitled to be discharged under Rule 1-4D 'supra.' Therefore, we hold that the Trial Court was correct in its overruling of appellant's motion." (Our Emphasis) (A. 17)

* * *

> "It is our conclusion that the appellant failed to comply with a procedural requirement, and has, therefore, failed in the procedural due process involved." (A. 18).

There is no question but that the requirements of Rule 1-4D are stricter than those held to be required by the cases interpreting the Sixth Amendment. A defendant released on recognizance must be tried within one year; a defendant in jail must be tried within six months or within fifty (50) days if he petitions for early trial.

Under both Rule 1-4D and the cases interpreting the Sixth Amendment, the delay must be caused by the government and not the defendant. Rule 1-4D requires that in his petition for discharge, the defendant must allege that he did not cause the delay. Only in this way may the defendant bring himself within the purview of the Rule. If the defendant makes such an allegation, it becomes incumbent upon the state to prove that the defendant did cause the delay. By these requirements, the Rule dictates how the matter is brought to issue and how the burden of proof is established.

If a state wishes to make a stricter requirement than the Constitution, it should be permitted to promulgate reasonable rules for its implementation. Requiring a standardized procedure assists defendants, the state and the courts in determining whether the Rule has been complied with. Clearly this serves a legitimate state interest.

This Court has long declined to review state court judgments resting on independent and adequate state grounds, because to do so would be to render advisory opinions. See *Fay* v. *Noia*, 372 U.S. 391, 428 (1963) where the Court said:

> "It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

The principle of not reviewing State court judgments, resting on independent and adequate state grounds, applies to both procedural and substantive State grounds. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). Regarding State procedural grounds, in *Henry, supra*, the Court stated:

> "These cases settle the proposition that a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with his procedural rules serves a legitimate state interest." at p. 447

Since the procedural rule, requiring Petitioner to allege the delay was not his fault, in this cause is clearly a legitimate state interest, this Court should decline direct review of its application in this cause by certiorari.

Regarding the identification of Petitioner at his trial as the person named in the affidavit the court specifically found that the State had sustained its burden of proof!

> ". . . The witnesses all testified substantially that the victim got out of the car, a fight ensued, and the victim was immediately knocked to the ground.
>
> ° ° °
>
> ". . . While it is true that the record does not reveal any of the witnesses expressly pointing out the appellant in the courtroom as 'the man', they did testify that they knew the appellant Ronald Norris, and that he was the man they saw fighting with the victim. (A. 12).
>
> ° ° °
>
> "Upon reviewing the testimony elicited at the trial we hold that it was sufficient to establish that the appellant was the victim's assailant." (A. 13).

In so holding, the lower court merely exercised sound discretion in determining the facts were sufficient to constitute an in court identification of Petitioner. The standard laid down in this cause does no more than establish a standard necessary to constitute an in court identification

of an accused. The standard established in this cause cannot be regarded as below the minimal due process requirements of the Federal Constitution, nor shocking to one's sense of justice. The establishment of such a standard is clearly a legitimate state interest.

As shown above, this court will not review State court judgements resting on independent and adequate state grounds, whether the state ground be procedural or substantive. *Fay* v. *Noia, supra; Henry* v. *Mississippi, supra.*

The standard for an in court identification established in this cause is an independent and adequate state ground, clearly serving a legitimate state interest. Consequently this Court should decline direct review of the matter by certiorari.

II

THE ISSUES RAISED BY PETITIONER PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS FOR THIS COURT TO RESOLVE.

Neither of the issues raised by Petitioner presents a special or important reason under Rule 19 of this Court, entitling him to review on a Writ of Certiorari. The claim that the Supreme Court of Indiana unconstitutional applied its Rule 1-4D, regarding Petitioner's right to a speedy trial, to the facts of this cause was decided on an independent and adequate non-federal ground as developed in Respondent's Argument, Part I. But even if not decided on non-federal grounds in the lower court, Petitioner does not make that first showing as to how he was denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States; nor does Petitioner show how the delay in his trial

was in any way oppressive, purposeful or prejudicial. Consequently, petitioner's claims regarding a speedy trial present no federal question.

The claim that Petitioner was not sufficiently identified at his trial as the person named in the affidavit charging him with the crime of Aggravated Assault and Battery and of which he was convicted is actually a sufficiency of the evidence question. And as more fully developed in Respondent's Argument, Part IV, this Court does not review sufficiency of the evidence questions. It is not a federal question.

Rule 19 of the Rules of the Supreme Court of the United States regarding considerations governing review on certiorari, states that:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court.
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or

has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Consequently, Petitioner is not entitled to a review on a Writ of Certiorari.

III

PETITIONER'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT WAS NOT VIOLATED.

Without waiving Respondent's position that Petitioner has not raised a substantial federal question and that the court's order was based on adequate and independent non-federal grounds, Respondent will show that Petitioner was not denied his Constitutional right to a speedy trial.

Petitioner has alleged that the Indiana Supreme Court has unconstitutionally interpreted and applied its own Rule 1-4D. This does not present a question cognizable by this Court. This Court has often held that the states must have latitude in working out their own procedural rules, and this court will only determine whether Constitutional standards have been violated. *Cooper* v. *California* 386 U. S. 58 (1967); *Ker* v. *California*, 374 U. S. 23 (1963). The question is not whether Indiana improperly applied its own Rule, but whether Petitioner was denied his Sixth

Amendment rights as they have been interpreted by this court.

The facts indicate that the assault and battery occurred August 6, 1965. The affidavit charging Petitioner with Aggravated Assault and Battery was filed August 26, 1965. Petitioner was tried on July 10, 1967. During this time, Petitioner was out of jail on bail.

The acts of Petitioner greatly contributed to the delay of which Petitioner complains. On September 2, 1965, Petitioner moved to continue arraignment. The motion was granted. On September 8, 1965, Petitioner requested additional time to employ counsel. The request was granted. On February 28, 1966, Petitioner moved to continue the trial. The motion was granted. On May 23, 1966, the day set for trial, Petitioner failed to appear without cause. The trial was continued. On May 31, 1966, Petitioner filed an amended motion for a change of venue from the county. The motion was granted. On June 29, 1966, the change of venue to another county was perfected. On July 10, 1967, Petitioner's trial was begun.

The time lapsed between the filing of the charge against Petitioner and Petitioner's trial on that charge was twenty-two (22) months. The time lapsed between the perfection of Petitioner's motion for a change of venue, the last delaying motion definitely attributable to Petitioner, and Petitioner's trial on the charge of which he was convicted was twelve (12) months. Regardless of the period of time adopted as controlling, the time lapsed was not so unreasonable in and of itself as to constitute a violation of Petitioner's right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. *United States* v. *Ewell*, 383 U. S. 116 (1966).

"Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Pollard* v. *United States*, 352 U. S. 354, 361 (1957). To establish the denial of his right to a speedy trial under the Sixth Amendment, Petitioner must allege circumstances which show the delay to be oppressive or to be the deliberate act of the State. *United States* v. *Ewell, supra.* And although not a declaration of this Court, the Federal Circuit Courts of Appeal have overwhelmingly held that the delay must be shown to be prejudicial to an accused's defense.

See: *Moser* v. *United States*, 381 F.2d 363, (9 Cir. 1967)
United States v. *Jackson*, 369 F.2d 936 (4 Cir. 1966)
Hedgepeth v. *United States*, 365 F.2d (D.C. Cir. 1966)
Magee v. *United States*, 392 F.2d 187 (1 Cir. 1968)
United States v. *Feinberg*, 383 F.2d 60, (2 Cir. 1967)

Petitioner, however, alleges no circumstances to show that the delay was the deliberate act of the State, that the delay was oppressive or that the delay was in any way prejudicial to Petitioner's defense. Having failed to allege such circumstances, this Court has no basis upon which to conclude the Petitioner's right to a speedy trial guaranteed by the Sixth Amendment was violated. Thus, the Petition for a Writ of Certiorari in this cause should be denied.

IV

PETITIONER WAS SUFFICIENTLY IDENTIFIED AT HIS TRIAL AS THE PERSON NAMED IN THE AFFIDAVIT CHARGING HIM WITH AGGRAVATED ASSAULT AND BATTERY.

Without waiving Respondent's position that Petitioner has not raised a substantial federal question and that the court's order was based on independent and adequate non-federal grounds, Respondent will show that Petitioner was sufficiently identified at his trial.

Petitioner claims there was no evidence by which the jury could have linked the person of the Petitioner with the testimony and other evidence presented at the trial, that the record failed to show Petitioner's presence at the trial, and that there was nothing resembling an in court identification of Petitioner.

However, the record shows that the witnesses against the Petitioner and the victim were all acquainted with the Petitioner prior to the trial. The witnesses and victim designated Petitioner by name in their testimony during the trial. And the record shows that Petitioner was present at the trial.

It is noteworthy that Petitioner does not contend that the trial was conducted in his absence. Nor does the Petitioner contend there was any question in the mind of the judge, jury, witnesses or victim that he was not indeed the person named in the affidavit charging him with the crime of which he was convicted.

In passing upon this issue, the Supreme Court of Indiana said:

> ". . . The witnesses all testified substantially that the victim got out of the car, a fight ensued, and the victim was immediately knocked to the ground.
>
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>
> ". . . While it is true that the record does not reveal any of the witnesses expressly pointing out the appellant in the courtroom as 'the man', they did testify that they knew the appelant Ronald Norris,

that he was the man they saw fighting with the victim. (A. 12).

* * *

"Upon reviewing the testimony solicited at the trial we hold that it was sufficient to establish that the appellant was the victim's assailant." (A. 13).

Clearly, the evidence presented at trial established Petitioner's identification in court. At best, Petitioner presents a sufficiency of the evidence question. However, as Petitioner has conceded in his brief this Court does not consider sufficiency of the evidence questions. See, *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1959), dealing solely with total absence of the evidence questions. Consequently the court should decide against Petitioner on this issue.

CONCLUSION

The Petition for a Writ of Certiorari prayed for in this cause should be denied.

Respectfully submitted,
THEODORE L. SENDAK,
Attorney General of Indiana

DONALD D. DOXSEE
Deputy Attorney General

WILLIAM F. THOMPSON
Deputy Attorney General
Attorneys for Respondent

219 State House
Indianapolis, Indiana
633-5512